

MCLE ON THE WEB (\$15 PER CREDIT HOUR)
TEST #20
1 HOUR CREDIT
SUBSTANCE ABUSE

To earn 1 hour of MCLE credit in the special category of substance abuse, read the substantive material, then download the test, answer the questions and follow the directions to submit for credit.

Alcohol And The Workplace

Alcoholism is a disability that presents serious legal and human resource management issues

By KAREN V. CLOPTON

According to The Other Bar, more than 20 million Americans suffer from alcohol or drug dependency. Sadly, it is generally accepted that the prevalence of chemical dependency within the legal profession is higher than among the general population.

It is well-documented that as many as 50 to 70 percent of lawyers who are respondents before bar disciplinary committees are chemically dependent and adversely affect their firms, workplaces and clients.

Alcoholism in the workplace, whether in law or other businesses, presents many legal and human resource management issues. Federal and California state disability and leave laws can greatly complicate an already difficult situation.

What is alcoholism?

Alcoholism is a genetic and progressively debilitating illness. Statistically, it affects more men than women, and usually surfaces between the ages of 20 and 40. Common symptoms of alcoholism in the workplace include bloodshot eyes, bloated or flushed face, hand tremors, irritability in the morning, long lunches, mood swings, absenteeism and chronic lateness.

According to the National Clearinghouse for Alcohol and Drug Information (NCADI), alcohol and drug users:

1. are far less productive;
2. use three times as many sick days;
3. are more likely to injure themselves or someone else; and
4. are five times more likely to file workers' compensation claims.

Alcoholism as a disability

The Americans with Disabilities Act (ADA), which applies to employers with 15 or more employees, and the California Fair Employment and Housing Act (FEHA), which applies to employers with five or more employees, both consider alcoholism a protected disability.

The ADA defines a covered disability in three ways. Specifically, an employee has a covered disability if the individual:

1. "has a physical or mental impairment that substantially limits one or more major life activities of such individual; or
2. has a record of such an impairment, or
3. [is] regarded as having such an impairment."

An individual must have either a physical or mental impairment to be disabled under the ADA's first definition of disability. While the ADA does not further define these terms, the Equal Employment Opportunity Commission's (EEOC) ADA regulations implementing Title I and the ADA's legislative history, two significant sources of guidance, define physical and mental impairment.

Specific disorders which are physical or mental impairments under the first definition of a covered disability include: orthopedic, visual or speech impairments; HIV infection (AIDS); cancer; alcoholism; diabetes; and emotional illness.

Rehabilitation Act coverage

Federal employers, federal contractors and recipients of federal funding, governed by §§501, 503 and 504 of the Rehabilitation Act 29 USCA §708(8)(C)(v), also consider alcoholism a covered disability, unless the employee's current use of alcohol prevents the employee from performing the duties of the job or the employee is a direct threat to the property or safety of others.

A covered FMLA illness

An employee qualifies for Family Medical Leave Act (FMLA) leave if he or she has a "serious health condition that makes the employee unable to perform the functions of the position of such employee." 29 USCA §2612(a)(1)(D). Alcoholics who have undergone treatment by a health care provider are generally deemed to have a serious health condition under the FMLA.

Alcoholism in the hiring process

Prior to extending a job offer, the EEOC and the California Fair Employment and Housing Commission have taken the position that testing for alcohol is prohibited in a pre-offer medical exam. Although an employer can ask a job applicant whether he or she drinks alcohol, the employer cannot ask if the applicant is an alcoholic. After a conditional job offer is made, the employer can ask the applicant about past or present alcohol use and possibly require testing.

At work

Under the ADA and California state law, an employer should hold an alcoholic employee to the same standards for job performance and behavior that it sets for other employees, "even if any unsatisfactory performance or behavior is related to the

. . . alcoholism of such employee." 42 USCA §1211(c)(4) However, managers and supervisors are not diagnosticians; they should concentrate on work performance.

Employees who abuse alcohol often exhibit the following poor work performance indicators:

increased mistakes, errors in judgment and a sudden inability to fulfill complex assignments or meet deadlines;

increased absenteeism or tardiness, excessive sick leave and frequent early departures, and patterns of absenteeism (Mondays, Fridays, day before or after holidays);
extended coffee breaks or excessive time on the phone;
irritability, moodiness, arguing with co-workers or insubordination toward supervisors;
complaints from customers, clients and co-workers regarding rude or inappropriate attitude and work quality of the employee;
drowsiness, slurred speech, clumsiness, shaky hands and cold, sweaty palms;
smell of alcohol on breath;
poor personal hygiene;
violent, erratic behavior, impatience and depression;
extremely emotional behavior, excessive talking, suspicious attitude toward others.

Discipline and discharge

If an employee is functioning the same as everyone else in his or her essential job functions, an employer cannot discharge the employee simply for being an alcoholic. Employers should have clear standards and job descriptions as well as alcohol and drug use policies.

If an employee's performance is suffering apparently due to alcohol abuse, the employee's supervisor should first meet with the employee, outline performance problems and try to find the cause of such problems.

The supervisor should present the assistance offered by the employer for alcoholism (e.g. health benefits, time off for rehabilitation, counseling, employee assistance programs). The supervisor should document the meeting, and if the employee acknowledges possible alcoholism, the record should be placed in the employee's confidential medical file, as required by the California Medical Records Act, rather than a general employment file.

If performance problems continue and the employee is not undergoing rehabilitation and treatment, the employee should be given the opportunity to sign a "last chance agreement."

This agreement should memorialize that the employer has given warnings about the employee's poor performance caused by alcoholism and has discussed rehabilitation options with the employee. The employee should agree to undergo a specific treatment program and remain alcohol-free, and state that the employer has the right to test for alcohol and to terminate the employee should he or she fail to stay alcohol-free.

Reasonable accommodation, treatment and rehabilitation

Employers should avoid "regarding" an employee as an alcoholic. If the employee denies having a drinking problem, the employer should take the employee's word or risk a disability lawsuit on the grounds that the employee was terminated because the employee was "regarded" as having the disability of alcoholism.

If the employee maintains that he or she does not have a drinking problem, then the employer should continue to require adherence to the job performance standards.

If such an employee requests leave to participate in a rehabilitation program, the employer should provide it or risk liability for failing to accommodate the employee's disability.

In addition, any reports of harassing comments about alcoholism should be investigated and discriminatory comments about a recovering alcoholic or an employee in treatment should be avoided.

Supervisors should not give the impression that alcoholism is the reason an employee is being disciplined or is on leave from work. The California Labor Code (§1026) safeguards employee privacy in this regard.

Employee behavior

The focus of comments and discipline should consistently be on the employee's behavior (e.g., tardiness, poor work quality, intoxication on the job). An employee's alcoholic dependency should only be addressed by recommending or granting the employee's request for a treatment program.

A leave to undergo a treatment program is the most common reasonable accommodation employers provide for alcoholic employees. The Department of Labor is clear that the FMLA covers only absences needed to obtain treatment and does not cover absences caused by the use of alcohol, 29 CFR §825.114(d), including time spent in jail.

In addition, California Labor Code §1025 provides that every private employer regularly employing 25 or more employees shall reasonably accommodate any employee who wishes to voluntarily enter and participate in an alcohol or drug rehabilitation program, provided that this reasonable accommodation does not impose an undue hardship on the employer.

Like the Rehabilitation Act for federal employees, the Labor Code also provides that an employer may refuse to hire or discharge an employee due to the employee's current use of alcohol, the inability to perform his or her duties, or the inability to perform duties without endangering the health or safety of himself or herself and others.

The employee must request an accommodation. If the employee does not tell the employer of his or her disability and request reasonable accommodation, the employer is not obligated to provide one.

Thus the employer is generally not obligated to accommodate an employee who denies that he or she has a problem. Of course, where the choice is between termination and rehabilitation, most employees will admit to a problem and request rehabilitation.

12-week leave

The employer must allow an alcoholic FMLA/CFRA (California Family Rights Act) leave for treatment up to a 12-week limit. To avoid violating the ADA, the employer should provide leave for a certified need for rehabilitation at least up to the maximum amount of leave the employer provides employees for other reasons. However, leave should not be provided due to an incapacity to work due to intoxication or its after-effects.

The ADA or Rehabilitation Act may require an additional reasonable accommodation if the employee has other disabilities. Depression, for example, is a common companion to alcoholism, and the employee may legitimately request a less stressful position if available and the employee is qualified.

The FMLA and the CFRA require that the employee be returned to a same or similar position after protected leave.

As The Other Bar (a State Bar-affiliated program for alcoholics) points out, alcoholism is not a moral issue; instead, it is a treatable illness which causes deterioration in job performance. The stigma is not in having the illness, but the failure to seek treatment.

Employers and non-employment lawyers should seek expert advice from experienced labor and employment lawyers to navigate the myriad laws and regulations that affect managing alcoholism in the workplace.

Karen V. Clopton is chief of operations of the Port of San Francisco, which has 44 bars and restaurants that serve alcohol on port property. She is a member of the State Bar's executive committee for the labor and employment law section and has practiced in the area for 18 years.

Test — Substance Abuse

1 Hour MCLE Credit

This test will earn 1 hour of MCLE credit in substance abuse.

1. True/False. Employers can fire alcoholic employees for taking time off due to treatment.
2. True/False. Employers should terminate for unreliability, intoxication on the job, spotty attendance or a bad attitude, but not for alcoholism.
3. True/False. If the employee cannot perform the essential functions of the job even after rehabilitation, the employee can be fired.
4. True/False. An employer should retain an employee who would pose a direct threat to himself or others.
5. True/False. Relapses strengthen the employer's hand.
6. True/False. Last-chance agreements are illegal.
7. True/False. Union arbitration can result in reinstatement.
8. True/False. Alcoholism is not a disability.
9. True/False. Recovering alcoholics must be given paid time off for rehabilitation.
10. True/False. Participation in an alcohol rehabilitation program prevents discharge of the employee.
11. True/False. After a leave for alcoholism treatment, an employee must be returned to the same or a similar job.
12. True/False. It is unlawful to regard an employee as an alcoholic.
13. True/False. An employer can ask a job applicant about his/her history of alcoholism.
14. True/False. Federal employees are covered by the federal Rehabilitation Act.
15. True/False. Employers should confront employees about their alcoholism.
16. True/False. Workers' compensation is available for alcoholic employees.
17. True/False. Employees can use leave to recover from drinking binges.

18. True/False. Alcoholism is often accompanied by other illnesses that are considered protected disabilities.
19. True/False. The majority of lawyers who are respondents before State Bar disciplinary committees are alcohol or chemically dependent.
20. True/False. Employers should treat admitted alcoholism as a private matter.

Certification

- This activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of 1 hour, of which 1 hour will apply to substance abuse.
- The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

MCLE ON THE WEB

TEST #20 – Alcohol And The Workplace

1 HOUR CREDIT

SUBSTANCE ABUSE

- Print the **answer form only** and answer the test questions.
- Mail **only form and check** for \$15 to:

MCLE on the Web

The State Bar of California

Attn: Ibrahim Bah

180 Howard Street

San Francisco, CA 94105

- Make checks payable to State Bar of California.
- A CLE certificate will be mailed to you within eight weeks.

Name

Law Firm/Organization

Address

State/Zip

State Bar Number (Required)

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|--------------------------|--------------------------|
| 1. TRUE ____ FALSE ____ | 11. TRUE ____ FALSE ____ |
| 2. TRUE ____ FALSE ____ | 12. TRUE ____ FALSE ____ |
| 3. TRUE ____ FALSE ____ | 13. TRUE ____ FALSE ____ |
| 4. TRUE ____ FALSE ____ | 14. TRUE ____ FALSE ____ |
| 5. TRUE ____ FALSE ____ | 15. TRUE ____ FALSE ____ |
| 6. TRUE ____ FALSE ____ | 16. TRUE ____ FALSE ____ |
| 7. TRUE ____ FALSE ____ | 17. TRUE ____ FALSE ____ |
| 8. TRUE ____ FALSE ____ | 18. TRUE ____ FALSE ____ |
| 9. TRUE ____ FALSE ____ | 19. TRUE ____ FALSE ____ |
| 10. TRUE ____ FALSE ____ | 20. TRUE ____ FALSE ____ |